IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6430 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE K.S.JHAVERI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MINAXI ICE & COLD STORAGE

Versus

NEW INDIA ASSURANCE CO.LTD.

Appearance:

1. Special Civil Application No. 6430 of 2002

MR JT TRIVEDI for Petitioner No. 1

MR BJ TRIVEDI for Petitioner No. 1

MR PV NANAVATI for Respondent No. 1

MR VIBHUTI NANAVATI for Respondent No. 1

MR VIRENDRA M GOHIL for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 06/09/2004

ORAL JUDGEMENT

1.1 The petitioner-firm has preferred this petition seeking for a direction to the respondent no.1-Insurance Company to pay to the petitioner-firm a sum of Rs.4,70,13,164/- together with the interest accrued thereon at the rate of 15% per annum until actual payment.

2.1 Briefly stated, the facts leading to the present petition are that the petitioner- firm was carrying on business in food and fish, selling and exporting. They used to store their goods in cold storage which required continuous and uninterrupted power supply, and therefore, the petitioner installed Generator Set. The officers of the respondent no.1-New India Assurance Co.Ltd. approached the petitioner-firm for business and after a detailed discussion it was conveyed to the said officers that the power supply from Gujarat Electricity Board being uncertain and not continuous, the Generator Set has been installed and the entire cold storage plant has been running on the power generated from the Generator Set, and therefore, the petitioner-firm wanted risk to cover the loss to stock and goods and also the loss on account of damage to Generator Set due to electricity failure. to which the said officers agreed by stating that an extra premium of Rs.55,860/- will be charged. Accordingly, the petitioner-firm paid, in all, a sum of Rs.2,85,145/-towards the said extra premium and the premium for other risks and a policy came to be issued by the respondent no.1 dated 4-2-1999 in the joint name of the petitioner-firm and the respondent no.2-bank as some loans were granted by the bank to the petitioner-firm.

3.1 It is the case of the petitioner-firm that on 30-10-1999 on account of failure of the generators, electricity supply was disrupted and stocks of goods worth Rs.4,70,13,164/- as well as the generator set worth Rs.60,000/-were damaged. The petitioner-firm then informed the respondent-1 about the damage and preferred claim under the policy no.220801/914/99990 dated 4-2-1999. Thereupon, the respondent no.1 repudiated the claim of the petitioner- firm on the ground that since the affected premises were running on one D.C.Set and not on the G.E.B supply or any other public supply, the fire policy issued by the respondent no.1 does not cover the loss to the stock of fish as well as damages to the D.C.Set, and hence, the present petition.

3.2 It is pertinent to note that the prayer in this petition seeks adjudication of money decree.

4.1 Mr. Trivedi, learned Counsel for the petitioner has submitted that the petitioner had moved the Consumer Disputes Redressal Forum and the following order came to be passed on 20th December, 2000 in Original Petition no.250 of 2000:-

> "We have examined the letter of repudiation of the Insurance Company. It appears to be on valid ground. The complainant was not getting electricity. The allegation is that the electricity supply was disconnected for whatever reasons may be. The complainant's grievance is that it was an electricity failure. We are of the view that rejection of the claim of the complainant cannot be treated as a consumer dispute in the facts of this case. The Original Petition is dismissed. The complainant is at liberty to seek remedy in some other forum, in accordance with law."

4.2 Mr. Trivedi, learned Counsel for the petitioner in support of his claim made in the petition has relied on the judgment of the Apex Court in the case of LIFE INSURANCE CORPORATION OF INDIA AND OTHERS v. SMT. ASHA GOEL AND ANOTHER reported in AIR 2001 SC 549, wherein at para 11, it has been held that:

> "The position that emerges from the discussions in the decided cases is that ordinarily the High Court should not entertain a writ petition filed under Article 226 of the Constitution for mere enforcement of a claim under a contract of insurance. Where an insurer has repudiated the claim, in case such a writ petition is filed the High Court has to consider the facts and circumstances of the case, the nature of the dispute raised and the nature of the inquiry necessary to be made for determination of the questions raised and other relevant factors before taking a decision whether it should entertain the writ petition or reject it as not maintainable. It has also to be kept in mind that in case an insured or nominee of the deceased insured is refused relief merely on the ground that the claim relates to contractual rights and obligations and he/she is driven to a long drawn litigation in the civil Court it will cause serious prejudice to the claimant/other beneficiaries of the policy. The pros and cons of the matter in the context of the fact situation of the case should be carefully weighed

and appropriate decision should be taken. In a case where claim by an insured or a nominee is repudiated raising a serious dispute and the Court finds the dispute to be a bona fide one which requires oral and documentary evidence for its determination then the appropriate remedy is a civil suit and not a writ petition under Article 226 of the Constitution. Similarly, where a plea of fraud is pleaded by the insurer and on examination is found prima facie to have merit and oral and documentary evidence may become necessary for determination of the issue raised then a writ petition is not an appropriate remedy."

5.1 Pursuant to the notice issued by this Court the respondent no-1 Insurance Company has filed their reply and has raised a preliminary objection to the effect that in such a case where money decree is prayed for the appropriate remedy is to file a civil suit and that the petitioner firm, with a view to save the Court has preferred the present petition under Article 226 of the Constitution. The respondents in their reply have categorically stated that the damage which has been caused to the petitioner-firm's goods is not due to power failure following damage to premises of public power station but due to failure of the DG set which was meant for generating electricity as can be seen from the surveyor's report. It is also the say of the respondents that the preambles of the policy unequivocally and clearly mentions that if after the payment of the premium the property insured described in the schedule or any part thereof such property be destroyed or damaged by (1) fire (2) lighting (3) explosion/implosion but excluding loss of or damage to boilers (other than domestic boilers), economisers or other vessels, machinery or apparatus in which steam is generated or their contents resulting from their own explosion/implosion (b) caused by centrifugal forces."The respondent no.1 has further pointed out to Part III Tariffs Section 10 sub-section (2) special perils which was part of the fire policy issued to the petitioner firm, the relevant portion whereof reads as under:

Fire Policy "C" covering stocks in cold storage premises may be extended to include deterioration of goods caused by change of temperature in cold storage premises in consequence of failure of electric supply due to damage to property at an Electricity Station or Sub-Station subject to the following endorsement wordings:-

In consideration of the payment of additional premium of Rs.....it is hereby agreed and declared that notwithstanding anything to the contrary in this policy or in any of its conditions, this policy covers destruction of or damage to the property hereby insured caused by change of temperature in consequence of failure of electric supply at the the terminal ends of the electric service feeders from which the insured obtains electric supply directly due to damage caused by any peril insured against under this policy to property at an Electricity Station or Sub-Station of Public Electric Supply undertaking from which the insured obtains electric supply."

6.1 Mr. Trivedi, learned Counsel for the petitioner has next relied on the decision rendered by the Honourable Supreme Court in the case of GENERAL ASSURANCE SOCIETY LTD V. CHANDMILL JAIN AND ANOTHER reported in AIR 1966 SC 1644 wherein it has been held at para 11 of the judgment that in interpreting documents relating to a contract of insurance, the duty of the Court is to interpret the words in which the contract is expressed by the parties, because it is not for the Court to make a new contract, however, reasonable, if the parties have not made it themselves.

6.2 Finally, Mr. Trivedi has relied on the observations made by the the Apex Court in the case of UNITED INDIA INSURANCE CO.LTD. V. M.K.J CORPORATION reported in III (1996) CONSUMER PROTECTION JUDGMENTS 8 (SC), more particularly, paragraphs 5 and 6 of the judgement which reads as follows:

"5. It is a fundamental principle of Insurance Law that utmost good faith must be observed by the contracting parties. Good faith forbids either party from concealing (non disclosure) what he privately knows to draw the other into a bargain, from his ignorance of that fact and his believing the contrary, just as the insured has a duty to disclose. Similarly, it is the duty of the insurers and their agents to disclose all material facts within their knowledge since obligation of good faith applies to them equally with the assured.

6. The duty of good faith is of a continuing nature. After the completion of the contract no

> material alteration can be made in its terms except by mutual consent. The materiality of a fact is judged by the circumstances existing at the time when the contract is concluded. In the present case, the introduction of the Tariff Advisory Committee document materially affects the terms of the policy, resulting in the denial of the very indemnity of claim and this was what the appellant sought to do, at the stage of clearing of the complaint. The Commission rightly rejected the appellants plea. Notwithstanding this, on behalf of the appellant it was insisted that the instructions of the Tariff Advisory Committee form part of the contract. Admittedly, the appellant-Insurer had not incorporated the above quoted clause as part of the policy undertaken with the insured. Consequently, the insured is not bound by this exclusionary clause of liability since the appellant-insurer, admittedly, had undertaken liability for the riot of strike, damage due to riot or strike."

7.1 The contentions raised by Mr. Trivedi though attractive lacks substance. The decisions cited by MR. TRIVEDI relate to the merits of the matter, and therefore, will not be of any help to the petitioner in the facts of the present case. Suffice it to say, that any observation if made by this Court, at this stage, will prejudice the case of the petitioner.

8.1 Having scrutinised the entire record of the case, as also, considering the ratio of the decisions cited before me by the learned Counsel for the petitioner, I am of the opinion that the petitioner firm's prayer for money decree is wholly misconceived inasmuch as the issue raised in the petition can be adjudicated only by leading evidence in order to ascertain whether any wrong as alleged by the petitioner firm is committed by the respondent no.1-Insurance Company, more particularly, when the factory of the petitioner-firm is situated at Porbandar and the fire policy was issued at Navsari. I am therefore, constrained to hold that the adequate remedy available to the petitioner is of filing a Civil Suit, and hence, I am not inclined to entertain this petition claiming for a money decree filed under Article 226 of the Constitution of India.

9.1 In conclusion, the petition fails and is dismissed. Notice is discharged.

(K.S.Jhaveri,J.)

stanley-ksj.